CHE PAH ITAM

v.

CHANG BEK LEE

HIGH COURT MALAYA, ALOR SETAR
ALAUDDIN MOHD SHERIFF J
[CIVIL APPEAL NO: 12-74-1989]
14 MARCH 1988

TORT: *Negligence - Contributory negligence - Road accident - Whether defendant failed to keep proper lookout - Whether defendant's conduct contributed to accident - Degree of care required*

TORT: *Negligence - Res ipsa loquitur - Whether doctrine applicable - Whether accident occurred on defendant's right of way*

EVIDENCE: *Burden of proof - Running down action - Allegation of contributory negligence against defendant - Whether negligence on part of defendant proved - Whether onus lies on defendant*

EVIDENCE: *Adverse inference - Failure of defendant to give evidence - Whether court compelled to accept plaintiff's version in toto - Whether principle of adverse inference applies*

The appellant/plaintiff brought an action against the respondent/defendant for damages for personal injuries and consequential loss and expense sustained by her and alleged to have been caused by the negligence of the defendant.

At first instance, the plaintiff called two witnesses to prove her case whilst the defendant was absent. It was held that the plaintiff had failed to prove negligence on the defendant, and further, that the grave and emergency situation was actually created by PW3 (the plaintiff's husband). The allegation of speeding on the part of the defendant was held to be a mere improvisation of evidence. The action was therefore dismissed and the plaintiff appealed. The question that arose was whether in the absence of the defendant's evidence the court was compelled to accept in toto the plaintiff's version.

Held:

[1] The burden was on the plaintiff to prove that there was some negligence on the part of the defendant or that the collision was caused or contributed by the defendant. The facts of this case were more consistent with contributory negligence on the part of PW3. There was no evidence of the defendant speeding, nor was there evidence to show that the defendant had failed to keep a proper lookout.

[2] Due consideration must be given to the defendant's conduct and the degree of care required in such a situation. Therefore, it could not be said that the defendant had contributed to the accident.

[3] The doctrine of *res ipsa loquitor* would be successfully raised where the accident occurred on the right of way of the party seeking to rely on the doctrine. In this case, the accident occurred on the defendant's right of way, which lead to a *prima facie* case of negligence on the part of the other driver.

[4] An adverse inference could not be drawn against the defendant for not giving evidence, as negligence on the part of PW3 had been rightly inferred from the latter's own evidence.

[5] The sessions judge had rightly concluded that the plaintiff had failed to discharge the burden of proving negligence on the part of the defendant.

[Appeal dismissed with costs.]

Cases referred to:
Fordon v. Harcourt – Rivington [1932] All ER 83 ***(refd)***
Jaffar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor [1997] 4 CLJ 509 ***(dist)***
Kek Kee Leng v. Teresa Bong Nguk Chin & Anor [1978] 1 MLJ 61 ***(refd)***
KR Taxi Services Ltd & Anor v. Zaharah & Others [1969] 1 MLJ ***(refd)***
Lew Voon Kong & Anor v. Mustaffa Khamis [1978] 1 MLJ 217 ***(refd)***
Lim Kar Bee v. Abdul Latif Ismail [1978] 1 MLJ 109 ***(refd)***
Nance v. British Columbia Electric Railway Company Ltd [1951] AC 601 ***(refd)***
Ng Chui Sia v. Maimon Ali [1983] 1 MLJ 110 ***(refd)***
Pua Lai Ong v. Kassim Yunus [1993] 3 CLJ 656 ***(refd)***
Tan Kheng Kuan v. Lim Chen Teik [1965] 1 MLJ 116 ***(refd)***
Wong Thin Yit v. Mohamed Ali [1971] 2 MLJ 175 ***(refd)***
Yap Yew Yee v. Subramaniam & Anor [1972] 2 MLJ 53 ***(refd)***

For the appellant - Jul Baharin Tajul Ariffin; M/s NM Tiong & Co
For the respondent - M Ramachandran; M/s Nijar, Kumar, Netto & Partners

Reported by Audrey J Pillai

JUDGMENT

Alauddin Mohd Sheriff J:

The appellant/plaintiff in this case brought an action against the respondent/defendant for damages (personal injuries and consequential loss and expense) sustained by her and alleged to have been caused by the negligence of the defendant in driving his motorcar bearing registration No. PAL 2782 along the Sungai Petani/Alor Setar trunk road on 21 November 1984 at about 4.30pm.

The plaintiff, at that material time, was a passenger in a motorcar driven by her husband (PW3) who was proceeding from Tokai towards Jalan Kangkong. The accident had occurred at the junction of the trunk road and the Kangkong/ Tokai road.

This case was heard by the learned Sessions Judge at Alor Setar. The plaintiff had called two witnesses to prove her case whilst the defendant did not give any evidence as he was absent. At the close of the hearing the learned Sessions Judge held that on the evidence adduced the plaintiff had failed to prove negligence on the part of the defendant and dismissed her action with costs. Against this decision the plaintiff has now appealed to this court.

It was not disputed that the plaintiff and her husband (PW3) were travelling along Jalan Tokai and had emerged from the said road with the intention of cutting across the trunk road into Jalan Kangkong and had collided into the defendant's car which was proceeding straight along the trunk road towards the north ie, in the direction of Alor Setar. It was also not disputed that the accident occurred on the defendant's right of way. As a result of the accident the plaintiff suffered the following injuries:

(i) fracture of the lower limb of the left hip.

(ii) fracture dislocations of the left hip.

(iii) shortening of lower limb.

(iv) cerebral concussion.

The burden lies on the plaintiff to prove that there was some negligence on the part of the defendant or that the collision was caused or contributed by the defendant.

In order to prove negligence on the defendant's part the plaintiff had relied heavily on her husband's (PW3) evidence. PW 3's evidence was that when he approached the said junction he stopped for about 20 seconds. Just then he saw the defendant's car coming from the left some 240 feet away (the distance of four lamp posts). Having ascertained that it was safe for him to cross he proceeded on to the trunk road moving towards Jalan Kangkong. It was at this moment that he saw a motorcyclist darting out of Jalan Kangkong proceeding towards Sungai Petani. Upon seeing the motorcyclist he applied the emergency brake to avoid a collision. As a result his car stalled. It was then that the defendant's car which was travelling north collided into his car. PW3 claimed that as a result of the impact his car was thrown some 21 feet away into the drain.

Although the defendant had not adduced any evidence he had nevertheless filed his statement of defence denying any liability whatsoever for the said accident.

In the absence of the defendant's evidence is the court compelled to accept in toto the plaintiff's version?

It is trite law that the onus of proving negligence lies on the plaintiff. In *Wong Thin Yit v. Mohamed Ali* [1971] 2 MLJ 175 Ong CJ (as he then was) held:

> In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of defendant's negligence.

Hashim Yeop A. Sani J (as he then was) addressing the same issue in *Ng Chui Sia v. Maimon bt. Ali* [1983] 1 MLJ 110 had this to say at p. 111:

> When an accidental harm is done it is not for the doer to excuse himself by proving that the accident was inevitable and that there was no negligence on his part. It is for the person who suffers the harm to prove affirmatively that the accidental harm was due to the negligence of the other person.

In the present case, the learned Sessions Judge on the evidence presented before her had come to the conclusion that there was no credible evidence of negligence on the part of the defendant as alleged by the plaintiff. She further held that the grave and emergency situation was actually created by PW3 when he failed to keep a proper look out upon coming on to the trunk road from Jalan Tokai.

The learned Sessions Judge also ruled that there was no evidence of speed on the part of the defendant as alleged by the plaintiff. The plaintiff's evidence on speed was a mere improvisation of evidence and should not be accepted.

There is no doubt that the plaintiff's main ground of appeal is based on this finding by the learned Sessions Judge.

The learned Sessions Judge was said to have erred in law and in fact when she failed to infer that the defendant was travelling at an excessive speed given the fact that the car was thrown 21 feet from the place of impact. If the defendant had not been travelling at an excessive speed he could have avoided the accident. Further, from the sketch plan there is no sign of any brake marks to show that the defendant had taken positive steps to avoid the accident.

In her judgment the learned Sessions Judge mentioned that the allegation that the defendant was speeding is not supported by any evidence. The plaintiff in her police report did not mention about this fact. She could not have forgotten this fact since the report was lodged barely 24 hours after the accident. To her mind this was clearly an improvisation of evidence on the part of PW3. In my opinion, no inference of speed can be made merely on the fact that PW3's car was thrown 21 feet away unless there are other corroborative evidence such as the police report, damage to the vehicles or the sketch plan to support the fact.

With respect, I agree with the finding of the learned Sessions Judge that there is no evidence to show that the defendant was speeding. Neither is there any evidence to show that the defendant had failed to keep a proper lookout.

On the contrary being in the situation he was in, it becomes the duty of PW3 to keep a proper lookout in that he must make sure that the trunk road is clear and safe for him to cross.

In *Tan Kheng Kuan v. Lim Chen Teik* [1965] 1 MLJ 116, Hepworth J observed as follows:

> ... It is a grave fault in motor driving to turn a vehicle across the general route of traffic without first seeing that there is a clear passage available. The act of turning across the line of oncoming traffic is one which imposes a special duty of care which is not necessarily discharged by giving the conventional signal to deviate from one's course but the actual precaution called for in any particular situation is a practical question and depends on the facts of the particular situation.

Mohamed Azmi J (as he then was) in *Yap Yew Yee v. Subramaniam & Anor* [1972] 2 MLJ 53 held that a taxi driver, on the main trunk road was entitled in the absence of any traffic sign to warn him of any danger ahead or of any indication by the motorcyclist coming from a minor side road to assume that the motorcyclist would stop at the junction and give him the right of way, and he found both in fact and in law a motorcyclist who suddenly emerged from a minor road without stopping at the junction was wholly liable for the accident.

The Federal Court in *Lew Voon Kong & Anor v. Mustaffa bin Khamis* [1978] 1 MLJ 217 had occasion to deal with the same matter. Chang Min Tat FJ (as he then was) delivering the judgment of the court had this to say at p. 218:

> There was absolutely no reason to expect that the motorcyclist, even if it was anticipated that he would disregard the stop-look-go indication across the side road, would execute such a sweeping and stupid turn. It was therefore not a case of the motorist not keeping a look-out. In the circumstances of this manoeuvre, when the motorist was approaching the junction, there was nothing he could do to avoid the collision. The blame must be laid entirely at the door of the motorcyclists.

Having examined all the cases cited above, I find myself unable to disagree with the finding of the learned Sessions Judge that it was PW3's negligent act of coming out from the side road onto the trunk road without any proper lookout that had caused the accident.

The other ground canvassed on behalf of the plaintiff in this appeal is that there is contributory negligence on the part of the defendant.

Based on the facts of this case, did the defendant's conduct at the material time contribute to the accident? What then is the degree of care required of the defendant in that situation?

The Federal Court in *K.R. Taxi Services Ltd & Anor v. Zaharah & Others* [1969] 1 MLJ held:

> The degree of care that need be kept while driving along an open country road is not quite the same as that which ought to be observed in crowded city street. Merely because drivers of motorcars and motorcycles do occasionally behave recklessly does not mean one must constantly anticipate that every other vehicle observed travelling normally is liable, without warning, to be driven, as if by a person suddenly gone mad. I do not think such extraordinary care and alertness is required of the motorist at all times he is on the road. Otherwise all vehicular traffic must grind to a standstill. What form of folly is to be regarded as foreseeable must depend on the surrounding circumstances of each case. I do not think any rule of general application should be laid down.

On the facts of this case, I cannot see how it can be said that the defendant had contributed to the accident.

The defendant was travelling on a major road which is also a highway. On that particular day the traffic was not heavy and as such one cannot expect the defendant to be travelling slowly and constantly being on the lookout for some irresponsible motorist who would suddenly cross the road.

In *Nance v. British Columbia Electric Railway Company Ltd.* [1951] AC 601 Lord Simon stated as follows:

> But when contributory negligence is set up as a defence, its existence does not depend on any duty owned by the injured party to the party sued and all that is necessary to establish such a defence is to prove to the satisfaction of the jury that the injured party did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.

On the contrary, I would say that the facts of this case are more consistent with contributory negligence on the part of PW3 as rightly pleaded by the defendant in his statement of defence.

In *Lim Kar Bee v. Abdul Latif bin Ismail* [1978] 1 MLJ 109 it was held that the law is content to take the cavalier view that a driver of a motorcar travelling along a main highway is under no duty to be on the look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner.

In the situation he was in, I am of the view that the possibility of any danger emerging would be too remote for the defendant to expect. Lord Dunedin in *Fordon v. Harcourt – Rivington* [1932] All ER 83 stated:

> If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligent, but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.

Seah FJ (as he then was) in *Kek Kee Leng v. Teresa Bong Nguk Chin & Anor* [1978] 1 MLJ 61 had this to say regarding a vehicle travelling on the main road (at p. 63 & 64):

> In the light of the above, it is quite plain that the plaintiff could not have reasonably averted the collision. In other words, the plaintiff just did not have the time to take reasonable steps to avoid the impact. Instead of emerging from the side road onto the main road where the plaintiff was approaching at a distance between 60 and 70 feet away, the 2nd defendant should have waited a little bit longer. When coming out from a side road onto a main road, the 2nd defendant should select such a moment as would allow him to enter the main road with safety. On the facts as well as the findings of the court the learned judge should have held that the accident was caused solely by the negligence of the 2nd defendant and that the plaintiff was in no way to be blamed for the collision.

In the same case, speaking of a driver who drives from a side road onto a main road, Chan Min Tat FJ (as he then was) at p. 62, said:

> He is an adult, licensed to drive and therefore presumably he has acquired a knowledge not only of the Highway Code but also of the ordinary precautions to be taken by him for his own safety as well as for the safety of others. If he

obtrudes himself on to the main road in circumstances which make it impossible for traffic coming behind him to avoid a collision, then I do not with respect, think there can be any doubt as to his entire responsibility for the accident.

Learned counsel for the appellant, in his last ditch to salvage the appeal, had (on 12 March 1998) produced a case for my consideration ie, *Jaffar Shaari & Siti Jama Hashim v. Tan Lip Eng & Anor*. [1997] 4 CLJ 509.

This case involves the principle of *res ipsa loquitor.*

In the first place, I must say that the facts of this case are to be distinguished with the facts of our case.

In Jaafar's case, the defendant said the deceased was crossing the road when it was unsafe for her to do so and that is why the accident occurred. The appellants on the other had alleged that the deceased was standing at the centre of the road when she was knocked down. The impact took place at the centre of the road. It is common gound that the scene of the accident is a built up area. Movement of pedestrians must therefore have been well within the reasonable foresight of other road users. The defendant himself admitted in his police report regarding the circumstances of the accident. His admission taken together with the sketch plan showed that they were more consistent with the defendant's negligence. *Res ipsa loquitor* was successfully applied against the defendant. The court held that the mere happening of an accident is not *res ipsa loquitor*, but if such an accident involves at least a demonstrable degree of negligence, be it a minor one, then the doctrine which is a rule of evidence applies.

Coming back to the facts of our present case, I would say that the doctrine of *res ipsa loquitor*, would be successfully raised as against PW3 because the event that would involve the doctrine would be PW3's car turning across the road causing the collision to occur on the right of way of the defendant and this I would say leads to a *prima facie* case of negligence on the part of PW3.

In *Jaafar's* case, the defendant also did not give evidence. It was held that the defendant was entitled to do so though they would be in peril of not having the evidence of their most important witness and of having any adverse inference drawn against them.

Reverting to our case, I cannot see how the learned Sessions Judge could raise an adverse inference against the defendant. On the facts, the learned Sessions Judge could and had rightly inferred negligence on the part of PW3, from his own evidence, although the defendant did not give any evidence (see *Pua Lai Ong v. Kassim bin Yunus* [1993] 3 CLJ 656.

As this appeal is only on the issue of liability which is a question of fact for the trial judge to decide, I am satisfied that based on all the facts before her, the learned Sessions Judge had come to the right conclusion that the plaintiff had failed to adduce any credible evidence to prove negligence on the part of the defendant.

Based on all the foregoing reasons and authorities, I would dismiss this appeal with costs.